No. 04-282

Supreme Court, U.S.
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In The

Supreme Court of the United States

STATE OF CONNECTICUT,

Petitioner,

v.

MICHAEL SPENCER,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Connecticut

RESPONDENT'S REPLY TO STATE OF CONNECTICUT'S PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The Connecticut Supreme Court in a factually based opinion correctly applied the principles enunciated by this Court in *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093 (1990) and reversed the respondent's conviction for possession of a narcotic substance. The case was remanded to the trial court with direction to grant the respondent's motion to suppress, *State v. Spencer*, 268 Conn. 575 (2004) (hereinafter *State v. Spencer*, as printed in petition of writ for certiorari, at A-1).

JURISDICTION

The trial court's decision was reversed by a four to one majority of the Connecticut Supreme Court. The decision below was released on April 27, 2004. By a four to three vote, the petitioner's motion for reargument and reconsideration *en banc* was denied on June 2, 2004. *See* Appendix at A-42. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1257(a) and Supreme Court Rules 10(b) and 10(c).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation,

> and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment of the United States Constitution provides:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The respondent, Michael Spencer, was arrested after a "controlled delivery" in which he signed for a Federal Express parcel containing marijuana. The parcel was not addressed to the respondent but had been sent to the three-family apartment building where the respondent and his wife resided on the second floor. The police arrested the respondent as he exited the front door of the building. Police found the Federal Express parcel placed by the respondent on a shelf in the common hallway. The respondent's apartment was at the top of a flight of twelve to fourteen stairs. The respondent remained silent after being arrested, handcuffed and Mirandized. The police claimed that the door to the respondent's apartment was ajar. The police executed a warrantless search of the respondent's second floor apartment. They observed a crack pipe and crack cocaine within a folded dollar bill on

the respondent's bed. At trial, the respondent challenged the legality of the search and seizure and sought to suppress the crack cocaine seized as a result.

The State of Connecticut charged the respondent with one count of possession of marijuana with intent to sell and one count of possession of crack cocaine. A jury of six returned a guilty verdict to the count charging possession of crack cocaine, and a not guilty verdict to the count charging possession of marijuana with intent to sell.

A. The Delivery, Arrest and Warrantless Search

On April 12, 2000, the sheriff's office of Shelby County, Tennessee notified the Stamford, Connecticut Police Department that it had intercepted a Federal Express parcel containing approximately twenty-seven pounds of marijuana. *State v. Spencer*, at A-5. The parcel was addressed to "Sylvia Sloan" at 16 Lipton Place, Stamford, CT. *Id.*[1] The Connecticut Supreme Court noted that the police did not investigate the name on the parcel "Sylvia Sloan" beyond their determination that "the name did not coincide with any of the information we found out regarding the apartment." A-22, Footnote 14. On the basis of this information Stamford police surveilled the residence and observed that it appeared to be multi-family house. *Id.*

Nobody by the name of Sloan was known to reside at that address at the time. *Id.* Police records disclosed that in the past Stamford police had responded to a domestic

[1] At trial, various witnesses referenced to the name on the parcel as "Sylvia Sloan", "Sylva Sloan" or "Sylvoan Sloan". A-5.

disturbance call that involved the respondent and his wife, both of whom resided on the second flood. *Id.*

The following morning, April 13, 2000, the police took possession of the Federal Express parcel from the Stamford Federal Express office. *Id.*, at A-5 to A-6. A police officer posing as a Federal Express deliveryman, rang the doorbell to the first floor apartment and knocked on the outer door of the building. *Id.*, at A-6. Spencer came down from his apartment on the second floor and opened the door. *Id.* Spencer verified the address and told the officer that his name was Michael Spencer and he lived on the second floor. *Id.* The officer told Spencer that the delivery was for "Sylvia Sloan" and Spencer repeated the name to himself and then told the officer he would accept the parcel. *Id.*, at A-6. The respondent Spencer signed the delivery invoice, took possession of the parcel, went inside and closed the front door. *Id.*, at A-6. As the delivery officer walked away, Spencer came out of the building without the parcel, and looked up and down the street. *Id.*

At this point, arresting officers approached Spencer in the front doorway of the multi-family home. *Id.* Officers identified themselves, brought Spencer back into the common hallway and observed the Federal Express parcel which had been left on a common shelf where the building's tenants left mail. *Id.*

The officers then read Spencer his *Miranda* rights and placed him under arrest. *Id.* Spencer denied knowledge of the contents of the package or of any one named Sylvia Sloan; he claimed that he innocently had accepted the parcel. *Id.*, at A-6 to A-7.

From the bottom of a stairway of approximately twelve to fourteen steps leading up to the second floor the

officers could see that the door to Spencer's apartment was ajar. *Id.*, at A-7. An officer asked Spencer if anybody else was inside the apartment and received no response. *Id.* Officers subsequently ascended the stairs and entered Spencer's apartment. *Id.* In the defendant's bedroom, officers observed on Spencer's bed a homemade crack pipe and a dinner plate containing crack cocaine residue, as well as a rolled up dollar bill containing crack cocaine. *Id.*

B. The Suppression Hearing

At the trial the respondent filed a motion to suppress the evidence of the crack cocaine claiming that such evidence had been obtained as a result of an unconstitutional warrantless search. *State v. Spencer*, at A-7 to A-8. During the suppression hearing, four arresting officers testified. *Id.*

An officer testified that after the arrest the respondent was unresponsive and nervous and that the apartment was searched because of the belief that another person was inside the apartment and out of concern that weapons might be present. *Id.*, at A-8 to A-9. The officer went on to say that this was "standard procedure" and "you have to do what you have to do." *Id.*, at A-9. Upon cross-examination, this officer testified that prior investigation revealed that no person named Sloan lived at 16 Lipton Place; his investigation did not reveal any indication that an individual at that address might be armed or involved in the drug trade. *Id.* Finally, the officer testified that the sweep was performed to "eliminate the possibility" and "we didn't want to be surprised." *Id.*

Other officers indicated that their prior investigation did not reveal any armed or dangerous people at the

address and that they were not aware of anybody in the "immediate area" who might have been "that magnitude of a marijuana dealer." *Id.*, at A-10.

At the suppression hearing the prosecution mistakenly argued that the warrantless search was justified, on various grounds, under *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093 (1990). *Id.*, at A-10. Defense counsel recognized *Buie* however distinguished this case in that in *Buie* officers were armed with a search warrant and that officers had a reasonable and articulable suspicion of an armed accomplice in *Buie*. Neither of these elements were fulfilled in the present case. *Id.*, at A-11.

The trial court, acting upon *Maryland v. Buie*, denied the motion to suppress. *Id.*, at A-11.

C. The Connecticut Supreme Court Decision

The respondent appealed to the Connecticut Supreme Court. The majority agreed that the warrantless search violated the defendant's right under the Fourth Amendment of the federal constitution. *State v. Spencer*, at A-11 to A-27. The dissent believed that the majority's opinion directly conflicted with the Second Circuit's decision in *United States v. Oguns*, 921 F.2d 442 (2d Cir. 1990). *State v. Spencer*, at A-26 to A-41.

The majority held that the warrantless search did not qualify as a second tier protective sweep. *Id.*, at A-17 to A-26. The Connecticut Supreme Court concluded that neither the fact that Spencer did not respond to officers' questions nor that officers had conducted "numerous" or "hundreds" of protective sweeps on prior occasions supported a reasonable belief that the defendant's apartment

harbored a third party posing a danger to those on the arrest scene. *Id.*, at 21. In its reasoning, the majority concluded that the officer's testimony reveals that they had no information that any person who posed a threat to the officers or to others might have been in the apartment at that time. *Id.*, at A-22. The majority indicated that the arresting officers possessed no more than a "generalized possibility" that an unknown, armed person may be lurking within the apartment. *Id.*, at A-23. Additionally, the Court observed that "lack of information cannot provide an articulable basis upon which to justify a protective sweep." *United States v. Colbert,* 76 F.3d 773 (6th Cir. 1996). *Id.*, at A-20 to A-24.

The majority then concluded by indicating that to allow the police to justify a warrantless search based solely upon that possibility of an armed individual within the premises would threaten to swallow the general rule requiring search warrants. *Id.*, at A-23. Furthermore, "allowing the police to conduct protective sweeps whenever they do not know whether anyone else is inside a home creates an incentive for the police to stay ignorant as to whether or not anyone else is inside a house." *Id.*, at A-23. The officers' lack of information "cannot be an articulable basis for a sweep that requires information to justify it in the first place". *United States v. Colbert*, 76 F.3d 773 (6th Cir. 1996).

REASON FOR DENYING THE WRIT OF CERTIORARI

I. THIS COURT SHOULD DENY CERTIORARI IN THIS CASE. THE CONNECTICUT SUPREME COURT VALIDLY FOLLOWED THE PRINCIPLES OUTLINED IN *MARYLAND V. BUIE* AND IN A DECISION BASED ON THE TOTALITY OF ALL FACTS HELD THAT THE WARRANTLESS SEARCH OF THE PREMISES WAS NOT A JUSTIFIABLE PROTECTIVE SWEEP.

The Connecticut Supreme Court declined to adapt a new rule of law and applied the exact law in complete accord with the requisites as set forth by this Court in *Buie*. *Id.*, at A-19 to A-24. This Court in *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093 (1990), enunciated a concrete doctrine in two levels which could validate a warrantless protective sweep. Under the first tier as an incident to a lawful arrest, officers could as a precautionary matter and without probable cause or reasonable suspicion, look into closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. *Maryland v. Buie*, 494 U.S. at 334. Under the second tier of *Buie*, the Court concluded: "Beyond that officers can search areas not adjacent to the place of arrest if there are particular facts which taken together with rational inferences from these facts would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to the officers." *Id.*, at 334-336.

A. The Connecticut Supreme Court applied a clearly focused objective standard basing their decision on the lack of articulable suspicion as testified to by all of the arresting officers.

The state argues that the majority of the Connecticut Supreme Court erred in its decision-making process by applying an improper subjective standard criteria. This is a myopic argument in that the Connecticut Supreme Court notes that the officer's testimony revealed no information that any person who posed a threat might have been in the apartment and that police held no more than a generalized possibility that an unknown, armed person may be lurking about. *Id.*, at A-22 to A-23. In its reliance on the cornerstones enunciated by this Court in *Buie*, the Connecticut Supreme Court notes that "it is the state's burden to demonstrate that the officers had a reasonable basis for believing" that a third party in the basement might attack them or otherwise interfere with the arrest. *Id.*, at A-18 to A-19. The Connecticut Supreme Court also adhered to this Court's holding that there must be articulable facts which, taken together with rational inferences from those facts would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scent. *Id.*, at A-19 to A-20.

The Connecticut Supreme Court continued in their objective evaluation of the officer's testimony in following the guidelines as set forth in *United States v. Colbert*, 76 F.3d 778. The Connecticut court correctly considered that the officer's lack of information cannot be an articulable basis for a sweep that requires information to justify it in the first place. *Id.*, at A-23.

Recognizing the often competing interest of the individual's expectation of privacy and officer's safety, the Connecticut Supreme Court correctly evaluated the proper procedure for affecting a second tier *Buie* protective sweep. The procedure must include articulable facts – that when taken together with rational inferences would form a basis of knowledge to legitimize a protective sweep. Again – lack of information (concerning the presence of a third party) cannot provide an articulable basis upon which to justify a protective sweep. *United States v. Colbert*, *supra*, 778.

The majority also considered investigating officers' testimony indicating their lack of knowledge and unfamiliarity with the respondent in concert with their total lack of information of whether Spencer had anyone else within his residence. *Id.*, at A-22. The Court considered that the officers testified that they had no knowledge of any persons living at that address who may have been armed nor did they have any information of anyone there involved in the drug trade. *Id.*, at A-22. Rather, upon cross examination, a testifying officer indicated that "we didn't want to be surprised." *Id.*, at A-23.

The Connecticut Supreme Court took particular note in its decision of the following colloquy with a testifying officer:

> **Q.** There came a time when you went up the stairs to go into (the defendant's) home –
>
> **A.** Uh-huh.
>
> **Q.** – and again, you had a suspicion that there were – you had a suspicion that there could be somebody armed upstairs?

A. A suspicion? I wouldn't say a suspicion but we had to know.

Q. A hunch?

A. Our suspic – not a hunch. Just, you don't even think about it. You just have to eliminate – we have to eliminate the possibility so we went up there with the possibility of that being there and we didn't want to be surprised. *Id.*, at A-9.

There is no question that when arresting officers have articulable facts that would warrant a reasonably prudent officer to believe that an area harbors an individual who may pose a danger that *Buie* would allow for a second tier protective sweep. It is just as certain however that in the absence of articulable facts, as in the case before this Court, the cornerstones enunciated in *Buie* demand more than:

You don't even think about it . . . we have to eliminate the possibility . . . we didn't want to be surprised. *State v. Spencer*, 268 Conn. 575, 583 (2004). *Id.*

To allow the police to justify a warrantless search based solely upon that possibility would threaten to swallow the general rule requiring search warrants. *United States v. Colbert, supra*, 76 F.3d 778; *Id.*, at A-23.

B. The Connecticut Supreme Court correctly determined that the respondent's silence, relying upon his rights granted in *Miranda v. Arizona*, was of minimal value in determining the basis for a protective sweep.

The majority correctly concluded in *Spencer* that the respondent's silence was not "sufficiently specific and

articulable to support a reasonable belief that the [respondent's] apartment harbored a third party posing a danger to those on the arrest scent." *Id.*, at A-21 to A-22. The majority also correctly concluded that the respondent's failure to respond to the officer's questions may have stemmed from a desire to invoke his *Miranda* rights. *Id.*, at A-21.

Certainly the respondent's silence in the wake of being "Mirandized" gave arresting officers no additional information or basis of knowledge to articulate a reasonable suspicion that persons inside the home were armed and posed a danger. More telling was the majority's reliance on officers' testimony that the protective sweep was their "standard procedure" and such searches had been conducted "numerous" or "hundreds" of times on prior occasions. *Id.*, at A-20 to A-21.

Applying this lack of a standard, that a protective sweep was not based upon any articulable suspicion but rather was generalized standard policy has been held by our courts to provide no basis to substantiate a reasonable belief for a second tier sweep. *See United States v. Brown*, 69 F. Supp. 2d 925, 931 (E.D. Mich. 1999) (protective sweep conducted "as a matter of course" unreasonable under *Buie*); *State v. Estep*, 753 N.E.2d 22, 28 (Ind. App. 2001) (warrantless search following arrest inside home unreasonable when conducted pursuant to "standard operating procedure").

Clearly the majority's decision and their consideration of insoluble ambiguities following post-arrest silence weighs the privacy expectation of the individual versus the oft times hazardous scenarios faced by police officers. By clearly outlining the two level tiers of *Buie*, the Connecticut

Supreme Court gave the appropriate guidance in demanding that police officers have an articulable basis upon which to justify a protective sweep and a caveat as to not purposely remain ignorant as an incentive to base warrantless home searches. *Id.*, at A-20 to A-23.

C. The Connecticut Supreme Court appropriately determined that the warrantless search did not constitute a valid protective sweep and gave diligent due accord to the Second Circuit Court of Appeals case of *United States v. Oguns*, 921 F.2d 442 (2d Cir. 1990).

The Connecticut Supreme Court found that the *Oguns* case was "sufficiently distinguishable" as to preclude its application to *Spencer*. *Id.*, at A-25. In *United States v. Oguns*, 921 F.2d 442 (2d Cir. 1990) an informant, co-conspirator told customs agents that another individual in Nigeria had instructed him to deliver over 1400 grams of heroin to either the defendant Oguns or to Oguns' brother and apartment mate Timo. *Id.*, at 444. In the first of two telephone conversations spoken in a Nigerian dialect, which was not understood by customs agents, the informant was directed by Oguns to deliver the "stuff" to Oguns' address. *Id.* The informant, co-conspirator was told that Oguns would be waiting for him outside of the apartment wearing short pants. *Id.* The agents conducted a controlled delivery outside of Oguns' apartment. *Id.*, at 445. Upon delivery, Mr. Oguns took the informant's garment bag, paid the taxi cab driver and proceeded towards his apartment. *Id.* Olawale Oguns was then arrested just outside of his apartment. *Id.* Seeing an open apartment door just inside the apartment building, one of the arresting agents asked Oguns if that was his apartment. *Id.*

Oguns responded it was and several agents conducted a security sweep of the apartment. *Id.* Olawale Oguns challenged the legality of the "protective sweep" to the United States Court of Appeals for the Second Circuit. Under Oguns' set of circumstances, the Court of Appeals rejected his challenge. In considering the legality of the entry into Oguns' home, the Second Circuit Court began with the axiom that warrantless searches "are per se unreasonable, subject to a few well-delineated exceptions." *United States v. Vasquez*, 638 F.2d 507, 529-30 (2d Cir. 1980) (citing *Schenckloth v. Bustamonte*, 412 U.S. 218, 36 L.Ed. 2d 854, 93 S.Ct. 2041 (1973)), *cert. denied*, 454 U.S. 975, 70 L.Ed. 396, 102 S.Ct. 528 (1981).

The majority of the Connecticut Supreme Court correctly distinguished factually, and ultimately legally, the *Spencer* case from that of *Oguns*. The Connecticut court identified the reasonable and articulable suspicions present in *Oguns* which were obviously lacking in *Spencer*. In *Oguns*, agents knew that the defendant was not only expecting the delivery of heroin from Adrenele but was willing to pay his cab fare upon arrival. *Id.*, at A-36. Additionally, *Oguns* had at least three co-conspirators whom the agents were presently aware of, to wit: his apartment mate and brother, Timo, Adrenele himself and Bola Williams, the woman in Nigeria. *Id.*, at A-25. Agents were also aware that although Oguns had informed Adrenele that Timo was not at home, the federal officers "nonetheless reasonably could have believed that an accomplice was inside the apartment at the time of the defendant's arrest." *State v. Spencer* at A-25. Further articulable suspicion could have been considered in *Oguns'* case which were not present in *Spencer* in that:

1) Investigating agents were not fluent in the Nigerian dialect spoken between the co-conspirators and would have valid suspicions regarding the conversations; A-24.

2) Oguns made it a point to request that Adrenele spend the night at his, Oguns, residence; A-36.

3) Saka Adrenele arrived at John F. Kennedy International Airport on a regularly scheduled flight. Time constraints could have been considered an issue if a warrant needed to be applied for. A-35.

The dissent in the present case concludes that *Oguns* is a case "almost identical" to *State v. Spencer* and that the warrantless search was a legitimate second tier *Buie* sweep. *State v. Spencer* at A-35 to A-38. The dissent goes on to opine that there were no distinguishing features between the two cases. In support of this conclusion, a single justice notes that in both cases: (1) a large amount of illegal drugs were destined for the defendant at his address; (2) there was no certainty that anyone else was in the apartment; (3) there was no specific evidence that whoever might be in the apartment would be armed and (4) the defendants were arrested outside the apartment and the door to the apartment was ajar, indicating that anyone inside would know of the arrest. *State v. Spencer* at A-36.

In the case presently before this Court, the Connecticut Supreme Court correctly analogized the reasoning in *Oguns* with the factual scenario as set out by all testifying officers in *Spencer* to disagree with the dissent that articulable facts taken together with rational inferences would warrant a reasonably prudent officer to believe an

area to be swept harbors an individual posing a danger. *Id.*, at A-24.

Based on the facts of the present case, the majority rejected the finding of the dissent as factually different in that:

1) In *Spencer*, the contraband was not known to be going to a specific individual as was obvious in *Oguns* – but rather was being sent to an unknown individual at a multi-family home.

2) The respondent in this case informed the officer that no one named Sloan lived at the home – but he would sign for it.

3) The respondent, Michael Spencer, both informed the officer of his real identity and signed for the parcel under that name.

4) There was never a nexus established between the respondent and the contraband in this case other than his signature. He did not pay any cash or delivery fee to show any interest in the parcel and the respondent in this case left the parcel in a common hallway as he departed the scene. *Id.*, at A-20 to A-26.

II. THE CONNECTICUT SUPREME COURT CORRECTLY DETERMINED THAT THE WARRANTLESS SEARCH DID NOT CONSTITUTE A VALID FIRST-TIER PROTECTIVE SWEEP AND THIS COURT SHOULD DENY CERTIORARI AS TO THAT ISSUE.

In *State v. Spencer*, the Connecticut Supreme Court accurately concluded that the warrantless search into the

respondent's home did not qualify as a permissible first tier *Buie* protective sweep. The Court held that within the first tier of protective sweeps, arresting officers can, "as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces, *immediately adjoining* the place of arrest from which an attack could be immediately launched." (emphasis added) *Maryland v. Buie, supra*, 494 U.S. 334. *Id.*, at A-18. The court in *Spencer* clearly noted that the (respondent) was arrested in a first floor common hallway at the bottom of a stairway of approximately twelve to fourteen steps leading up to his second floor apartment. Therefore, the defendant's apartment cannot be characterized as a space "immediately adjoining" the place of arrest. *Id.*, at A-18. Clearly, the Connecticut Court declined to accept the fiction that a residence across a common hallway, up a flight of stairs and behind a partially closed door could be an area immediately adjoining the place of arrest. Unlike cases as cited by the state: *In Re Sealed Case 96-3167*, 153 F.3d 759 (D.C. Cir. 1998); search justified under hot pursuit exception; *Ortey-Sandoval v. Gormey*, 81 F.3d 891 (9th Cir. 1996); attached garage previously converted into an apartment with open ceiling above defendant's bed; *United States v. Lauter*, 57 F.3d 212, 216-217 (2d Cir. 1995), police obtain warrant to search residence but did not specify defendant's apartment number; and *United States v. Robinson*, 775 F. Supp. 231, 232-235 (N.D. Ill. 1991); defendant "backpeddles" to the wall immediately adjacent to the interior doorway, the respondent in the case before this Court was "controlled" a substantial distance from the entrance to his home while he exited the building.

CONCLUSION

The respondent, Michael Spencer, respectfully requests this Court to deny certiorari. The Connecticut Supreme Court, in a four to one majority, correctly determined that the state failed in its burden, as evidenced by the testimony of arresting officers, to substantiate a reasonable, articulable basis for a warrantless search of the respondent's home. This Court was very specific in its guidelines as set forth under *Maryland v. Buie*, *supra*, 494 U.S. 325, 110 S.Ct. 1093 (1990) for warrantles home searches. Unquestionably the Connecticut Supreme Court gave due diligence to the parameters limiting the validity of a second tier protective sweep as enunciated in *Buie*. According to the arresting officer's own testimony the protective sweep was done as a matter of "standard procedure" and had been undertaken "hundreds of times in the past."

It is abundantly clear that law enforcement could be made easier and possibly more efficient if the Fourth Amendment was not firmly entrenched in our Constitution. The fact is, however, that our Fourth Amendment guarantees a privacy expectation our citizens have come to expect and demand. The Fourth Amendment to the Bill of Rights cannot be sacrificed to the simplistic overtures of "Standard Procedure."

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